Thye Phin v. Lim Ah Chen and others[2] where a certain part of the Trust Fund was bequeathed by Clause 12 of the Will to the Trustees to be expended, inter alia, "in providing for and performing the proper yearly ceremonies according to Chinese custom for my deceased ancestors, myself and my wives, etc". The judgment of Terrell, J. contains the following passage :—

> The matter, however, went to appeal and the formal order of the Court of Appeal declared that there was an intestacy with regard to the income of the two shares bequeathed for ceremonies. From the written judgments it is clear that the gift was held to be void on the ground of uncertainty.

The answer to *Question 6* is, therefore, that the direction is not valid in law.

The costs of both parties for this hearing should be taxed as between Solicitor and Client and paid out of the estate.

Order Accordingly.

HAJI ABDUL HAMID v. M. K. RAMASAMY PILLAI.

[Orig. Civil Juris. (Evans, J.) March 17, 1948]
[Ipoh — Civil Suit No. 25 of 1947]

Landlord and Tenant — Claim for possession — Acceptance of rent after expiry of notice to quit.

In this case the plaintiff claimed possession of premises let to the defendant on a monthly tenancy. One of the points raised in defence was that rent had been accepted after the commencement of the action and it was argued that the acceptance of rent implied a new tenancy.

Held, (1) that acceptance of rent is merely evidence from which an agreement of a new tenancy may be inferred but it is evidence which must be assessed in the light of all the circumstances and relations of the parties; (2) that in the circumstances of this case it would be manifestly unreasonable to infer such an agreement from the acceptance of rent.

Cases referred to :—

(1) *Hartell v. Blackler* (1920) 2 K.B. 161.
(2) *Davies v. Bristow* (1920) 3 K.B. 428.
(3) *Shuter v. Hersh* (1922) 1 K.B. 438.
(4) *Morrison v. Jacobs* (1945) 1 K.B. 577.
(5) *Lowenthal v. Van Honte* (1947) L.J. K.B. 421.

CIVIL SUIT.

Plaintiff in person.

M. S. Mahendran for the Defendant.

Evans, J. : — In this case the Plaintiff is claiming possession of a house known as No. 9, Jalan Datoh, Kuala Kangsar, of which he is owner, from the Defendant to whom, he says, he had let it on a monthly tenancy. He also avers that he has obtained the consent of the Rent Board and has served the Defendant with a notice to quit. All this, except the nature of the tenancy, is admitted, and that the parties have in fact been twice before the Rent Board and before the District Court, and that two notices to quit have been served. The effect of these on one another is not raised and they are accepted as good and effective to determine a monthly tenancy.

The Defendant pleaded that the tenancy was a yearly one. He asserts that a lease was made for 3 years and he subsequently held over. He has failed to prove that lease. Were the lease here, there might be terms implying that on holding over he remained as a yearly tenant. The only evidence I have of the tenancy is that the rent is paid monthly. The usual tenancy here is a monthly tenancy, and I shall treat this tenancy as a monthly tenancy. For such the notices are good.

The first order of the Rent Board gave the Defendant 8 months' grace, and at the end of that period the Plaintiff gave the Defendant notice to quit at the expiry of one month. The following month he took action in the District Court and obtained judgment. Unfortunately for him, the rent is $75/- per month and the District Court had no jurisdiction. On that ground alone an appeal was allowed. On 28th February, 1947, the Plaintiff served another notice. The need of this is not apparent as the only defect, though a substantial one, in the decision and order of the District Court was that it was beyond that Court's jurisdiction. One result of the second notice seems to have been that the Defendant made another application to the Rent Board to reconsider their earlier decision. The Board then made this order of 31st March on which Mr. Mahendran bases his first point. The order reads as follows :—

> The Board decides to confirm the previous order having regard to the former order of the Board and to allow extension if applicant Ramasamy Pillai applies.

Mr. Mahendran criticises that order quite properly and says it is not definite, clear, and decisive, as indeed it is not. It is, however, conclusive on this Court. It begins: "The Board decides to confirm the previous order...." That is clear enough. It goes on: "having regard to the former order of the Board." Those words are to me almost meaningless. If I had to construe the order and attach meaning to those words, I should be inclined to read them with the following words, although separated from them, by an

"and". The previous order was clear enough, and concluded: "The Board after discussion decides that the Respondent on behalf of the Bharat Store should be allowed 8 months from date of this meeting to quit the premises." When the order of 31st March says: "and to allow extension if applicant Ramasamy Pillai applies" I think it is having regard to the terms of the earlier order. The Board seems to have thought originally that the Defendant should have 8 months to make arrangements and to ease his removal. When he came back in March and was still in possession, they may have thought he should still have a reasonable period of grace if he required it, but it is not clear to whom he should apply. The whole order is not clear, but I must construe it in the light of the rights of the parties at the time. The Plaintiff had the consent of the Board to eject his tenant and he had by notice terminated the contractual tenancy. Mr. Mahendran said the order was too obscure for the Plaintiff to act upon. He is not acting on it, and does not have to rely on it. The Defendant applied for a variation of the original order, and the original order stands except in so far as it may be varied. It is the Defendant who relies on the order of 31st March, and so far as it may be obscure, it is to his disadvantage. The Defendant has had plenty of time. I do not think there is anything in Mr. Mahendran's first point.

His second point arose on the hearing. It is not referred to in the pleadings. In fact, it is negatived in the defence when the Defendant alleges a refusal to accept rent. It now appears that on 30th November, and a month after the defence was filed, the Defendant paid to the Plaintiff all arrears of rent, and the Plaintiff has since received rent monthly. Mr. Mahendran argues that this acceptance of rent implies a new tenancy. There is no doubt as to the general rule that from such payment and acceptance a tenancy may be implied. In this case, the Plaintiff has said he intended nothing of the kind, and he points to unquestioned facts which suggest he wanted to be done with his tenant, his repeated notices and proceedings. Neither side cited any cases on this point, which was completely unexpected, and I adjourned to consider the force of the usual implication in the circumstances proved, and how far I am obliged to make this presumption.

In England, the point has come up for reconsideration in the light of the relationship of a statutory tenant in the cases of *Hartell v. Blackler*[1], *Davies v. Bristow*[2], *Shuter v. Hersh*[3] and *Morrison v. Jacobs*[4]. The first would tend to shew that the presumption is rather of waiver of the notice to quit and is one *juris et de jure*. That case must, however, be taken as since overruled, and the true view of the law, that put forward by Mr. Murphy in the first case, that the rules as to waiving forfeiture are not strictly applicable to waiving the notice. It is not necessary to go closely into these cases as they are not entirely on all fours with this.

The Rent Restriction Legislation has been superimposed on the general law of landlord and tenant, and in England the relationship of statutory tenant and contractual tenant has always been clearly distinguished. Unhappily, in this country, there have been conflicting decisions, and it has been held that a notice to quit is a step towards ejecting a tenant. It is not clear to me why this should be, but if it be the law it follows that the contractual relationship of a periodic tenant cannot be ended without the permission of the Rent Board, so that the contractual tenant in possession with the consent of the landlord, and the statutory tenant in possession against his will are indistinguishable.

It is obvious that the inference to be drawn from a man's acts must depend on his freedom of choice, and that the acceptance of rent from a statutory tenant whom the landlord can't eject is no certain evidence or representation as to his state of mind.

In this case the Plaintiff did not give notice to quit before going to the Rent Board. The Rent Board gave the Defendant 8 months' grace. The application must be taken as showing the landlord wanted possession and this term of 8 months must be regarded as given for the benefit of the tenant, and against the wishes of the landlord. He had not, however, terminated the contractual tenancy and did not attempt to do so, but, possibly, on the view of the law referred to above, gave notice expiring with the term "granted" by the Board over someone else's land. In effect the contractual tenancy, if the mere application is not to be regarded as a notice, terminated with that imposed by the Board's statutory powers. Thereafter, the tenant was a trespasser in law, and could the landlord have taken possession he might have retained it. The tenant's conduct sent him to the Courts for an order. The tenant's position meantime is, however, not that of a mere trespasser, as the Rent Restriction Enactment gives him a further right by inference, that is, a right to apply to the Board to reconsider its decision. This right, it may be noted, is not limited to the time he remains in possession, although it would seem so limited by common sense, if

common sense can be applied to legislation dictated by sentiment. Conversely, this right must, it would seem, continue as long as possession is retained.

The Plaintiff, after mistaking his court, served a second notice to quit. Such notice does not imply an intermediate tenancy, *Lowenthal v. Van Honte*[5]. The Defendant re-applied to the Rent Board, but received no grant of any further term certain. He probably became inevictable for a reasonable period for convenient removal. The Plaintiff then began proceedings in this Court and, after the filing of a defence contesting his claim, accepted rent for six months past.

The Defendant was never a statutory tenant in the sense of the English cases, at the same time he has always had the right to apply referred to. Since the defence was filed, and possibly before, he has alleged a right to possession, independent of any implied tenancy, and inconsistent with it. He does not himself put forward the payment of rent as a representation by conduct to him, or as being any form of compromise. He speaks of it with allegations of demanding tea money as shewing, in the words of his Counsel, that the condition of the order of 31st March, 1947, has not been fulfilled — meaning, perhaps, rather that continued negotiations have been a reason for not acting on the alleged condition. These allegations involve charges of offences under Sections 8 and 14 of the Enactment which the Defendant has taken no steps to prosecute, and I cannot, therefore, accept them entirely. An owner is, however, always free to negotiate as to his property, and nothing conclusive is even alleged.

On the view that a notice to terminate a contractual tenancy is a step in ejection, and therefore that every periodic tenancy so terminable exists at law independently of the landlord's will (and this view seems to have been taken by Plaintiff) I should hold that this case is, in essentials, indistinguishable from those cited. I do not, however, think that is the correct view of the law. The only fetters on the landlord after 30th November, 1946, are those occasioned by the law's delays and the right to re-apply, and the latter is only effective after application has been made. The Judges in the cases cited do not say that the acceptance of rent is generally conclusive. As I read these judgments, they say no more than that it may be evidence of an agreement. Scott L.J. said in *Morrison v. Jacobs*[4] at page 580: "It is erroneous, I think, to hold, in the case of a dwelling-house to which the Rent Restriction Acts apply, that where the tenant has remained in possession after a term of years and the landlord has accepted rent from the tenant, any such inference of a *consensus ad idem* between the parties to a new common law tenancy arises, because before *the passing of those Acts in certain circumstances* such an inference could be drawn." And MacKinnon L.J. at page 583 says: "I gathered that counsel's contention was that after this period of three months, the acceptance of rent by the landlord would afford some evidence of the creation of a new contractual tenancy." Shearman J., whose judgment seems to have been generally approved, said in *Davies v. Bristow*[2] at page 440: "A notice to quit can be withdrawn at any time *before* the date fixed for the termination of the tenancy. But after the time has expired the lease is at an end and a landlord can no more waive his notice to quit than he can waive the effluxion of time. I infer that the expression 'waiver of notice to quit' wherever it is used in the report merely means that the parties have arrived at a new agreement, but that agreement to be (like?) any other agreement must be proved in the ordinary way." As I understand the law, acceptance of rent is merely some evidence from which agreement may be inferred where alleged, and where it stands alone may be strong evidence. It is however, evidence and no more. It must be assessed in the light of all the circumstances and relations of the parties. In this case, to infer such agreement in all the circumstances would be manifestly unreasonable. There is, therefore, in my opinion nothing in the pleas put forward, and the Plaintiff is entitled to the relief asked.

Judgment for Plaintiff.

LEONG CHOONG v. LEONG KOH FOONG AND ANOTHER.

[Orig. Civil Juris. (Pretheroe, Ag. C.J.) June 4, 1948]
[K.L. — Civil Suit No. 29 of 1947]

Contract Enactment (Cap. 52) s. 238 — Principal and agent — Fraudulent act by agent.

In this case it appeared that the 1st Defendant, who was appointed by the Plaintiff as his manager, sold and transferred the business known as Wah Hing Hat Factory (belonging to the Plaintiff) to the 2nd Defendant, who had no knowledge of the first defendant's lack of title. The plaintiff claimed a declaration that he was the owner of the business.

Held, that by virtue of s. 238 of the Contract Enactment, the first defendant's fraudulent dealings with the plaintiff's property did not affect the rights of the plaintiff and that judgment must therefore be given for the plaintiff.

Case referred to :—

(1) *Farquharson Brothers & Co. v. King & Co.*, (1902) A.C. 325.